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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DANIEL HYUNMIN CHO,
Plaintiff and Appellant,

v.

STATE BOARD OF OPTOMETRY, et
al.,
Defendants and Respondents.

A153602

(Alameda County
Super. Ct. No. RG16840885)

Daniel Hyunmin Cho appeals from a judgment dismissing his petition for a writ of administrative mandamus (Code Civ. Proc., § 1094.5) after the State Board of Optometry (Board) found he practiced optometry without a license and placed his license on probationary status. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

In an Amended Accusation, the Board alleged that Cho engaged in (1) the unlicensed practice of optometry on February 11, 2013 and February 18, 2013, in violation of Business and Professions Code sections 3110, subdivision (s) [forbidding the “practice of optometry without a valid, unrevoked, unexpired license”] and 3040 [making it “unlawful for a person to engage in the practice of optometry or to display a sign or in any other way to advertise or hold himself or herself out as an optometrist without having first obtained an optometrist license from the board”]; (2) dishonesty, by holding himself out as a licensed optometrist before receiving licensure (§ 3110, subd. (e)); and (3) general unprofessional conduct (§ 3110, subds. (a), (f)).

The matter proceeded to an administrative hearing on September 14, 2016, before an administrative law judge (ALJ).

A. September 2016 Administrative Hearing

Before he was licensed in California as an optometrist, Cho began the process of purchasing 20/20 Eye Club Optometry (20/20), an optometry practice owned by licensed optometrist My Diep. Dr. Diep was not aware that Cho was not yet licensed. On Tuesdays and Wednesdays – the days Dr. Diep worked at 20/20 – Dr. Diep familiarized Cho with her practice and allowed him to shadow her as she examined patients. Dr. Diep did not work at 20/20 on Mondays.

On February 14, 2013, Cho took and passed the optometry licensing examination. In a February 14 email apprising Cho of his passage, the Board warned him: “YOU ARE NOT LICENSED TO PRACTICE AS AN OPTOMETRIST.”

At some point, the Board received a consumer complaint from a patient (C.K.), indicating that Cho had performed an eye examination before he was licensed (indeed, before he even took his licensing examination) at 20/20 on Monday, February 11, 2013. Attached to the complaint was a photocopy of a prescription written on 20/20 letterhead under the name of Dr. Diep.

Board investigator Doris Pau was assigned the matter and interviewed Dr. Diep. When Pau confronted Dr. Diep with the prescription taken from her prescription pad, Dr. Diep stated that the writing was not hers, and that she believed it to be that of Cho, whom she thought was a doctor. Dr. Diep testified that she left her prescription pads at the office, and that Cho did not have her permission to use them. Dr. Diep told Pau that Cho worked at 20/20 on Mondays, without Dr. Diep or another optometrist present, from February 4, 2013 until Cho purchased 20/20 on February 20, 2013.

Pau also interviewed Cho, who admitted that he wrote the prescription. When Pau asked Cho when he became licensed to practice, his demeanor changed. Previously he had been forthcoming and cooperative, looked her in the eye, and answered all of her questions. However, Paul recalled: “[A]s soon as I asked him when he became licensed, he fell forward at the waist and his shoulders went down and his head went down and he

would not look up at me. And Investigator Tennyson and I looked at each other wondering what was going on. And so I asked him, you know, were you licensed when you wrote this prescription, and he said he was not.” Cho told Pau that since he had passed the licensing exam he “ ‘didn’t think it would be such a big deal,’ ” and he thought his license “ ‘was in process’ ” and he “ ‘assumed it was okay’ ” because he was licensed to practice in Michigan as of November 2012.

Pau subpoenaed billing records from insurance provider Vision Service Plan (VSP). After reviewing the records and conducting interviews, Pau concluded that for Monday, February 11, 2013 and on Monday, February 18, 2013 – days that Dr. Diep did not work at 20/20 and before Cho was licensed – Cho had billed VSP for services. VSP records introduced at the hearing showed VSP claims for six patients on February 11, 2013 and seven patients on February 18, 2013.

At the hearing, Cho claimed he did not understand he was unlicensed on February 18 until Pau told him. Furthermore, he claimed he might not have seen the number of patients indicated in the VSP records because the “dates of service” could have referred not to dates of service, but to the dates that staff called VSP to verify or authorize coverage for a patient. Nonetheless, Cho admitted seeing patients on February 11 and 18, 2013. As to February 11, he insisted that he only saw the complaining patient C.K., and believed he was acting as a “Good Samaritan” because she was complaining of eye pain or irritation and he wanted to rule out something serious. He claimed he would do the same thing again. As to February 18, Cho admitted as follows: “Q. Now you agree that you saw those seven patients, right? [¶] A. I don’t know if I saw all of them. I don’t remember how many I saw that day.” Cho did not have malpractice insurance as of February 18.

Cho’s optometry license – entitled Certificate of Registration to Practice Optometry – was not granted by the Board until February 19, 2013.

After the hearing, the ALJ issued a proposed decision, finding that Cho practiced optometry without a license on February 11 and 18, 2013.

B. Board of Optometry's Decision

On November 15, 2016, the Board issued a Final Decision, adopting the ALJ's findings and concluding that Cho committed the charged violations, including the unlicensed practice of optometry.

Among the findings adopted by the Board were those regarding Cho's conduct and credibility: "Respondent's behavior and attitude since these unfortunate events is highly relevant in considering the appropriate discipline to impose. Respondent was not forthcoming or completely honest with the investigator. At the hearing, he testified that he felt blindsided when interviewed, and said he was grateful for the chance to tell his story. But he did not tell a very clear or thorough [story] despite the full opportunity to do so. Respondent again was not entirely forthcoming and attempted to excuse his conduct in unpersuasive ways. It is therefore not clear that Respondent appreciates the serious nature of his misconduct. Of particular concern is his testimony that he would treat a patient like [complainant C.K.] again, despite not being licensed, in the same circumstances. But there was no emergency situation and there were other options open to him; for example, to telephone another optometrist, make an appointment for her with someone else, or even take her to see another doctor. As to the February 18 patients, he says both that he did not think it was a big deal and that he thought he was 'good to go' despite the very clear notice from the Board that passing the examination did not equal licensure. [¶] It is hoped that Respondent has learned important lessons from this experience. But under these circumstances, the public interest requires a period of probation to ensure the lessons were learned and that he is safe to practice optometry and will do so [consistently win] the law and regulations governing optometry practice."

The Board revoked Cho's optometry license, stayed the revocation, and placed "the license" on probation for three years, subject to certain terms and conditions.

C. Petition for Writ of Administrative Mandate

On December 1, 2016, Cho filed a petition in Alameda County Superior Court for a writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5.

He contended that the findings against him were not supported by sufficient evidence and the penalty was too harsh.

On December 9, 2016, the court granted Cho a stay of the Board's decision pending the writ proceeding, "until March 23, 2017," the date of a case management conference. (See Code Civ. Proc., § 1094.5, subd. (h).)

A hearing on Cho's petition took place on May 17, 2017. By written order of June 8, 2017, the court found that Cho had not met his burden of showing that the Board's finding of unauthorized practice of optometry was against the weight of the evidence in the record. The court also rejected Cho's argument that the Board's discipline was too harsh and constituted an abuse of discretion.

The court entered judgment in favor of the Board and dismissed the writ petition on January 23, 2018. This appeal followed.¹

II. DISCUSSION

On appeal from an order denying a petition for a writ of administrative mandamus under Code of Civil Procedure section 1094.5, we review the record to determine whether the court's factual findings are supported by substantial evidence, review de novo any pure questions of law decided by the trial court, and review de novo whether the agency abused its discretion in imposing its penalty. (*Cassidy v. California Board of Accountancy* (2013) 220 Cal.App.4th 620, 627–628.)

A. Substantial Evidence

Cho urges that the "findings" are not supported by a "preponderance" of the evidence. It is unclear whether his contention is that the trial court erred in concluding the Board's findings were supported by the weight of the evidence, or that the trial court made findings that are not supported by substantial evidence. In either event, the question on appeal is the same: we review the administrative record for substantial evidence. (See *Cassidy, supra*, 220 Cal.App.4th at p. 627; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143 fn. 10 [where the trial court exercised its independent judgment on the

¹ On May 4, 2018, Cho filed a motion in this court for a stay of the administrative decision; we denied the motion on June 15, 2018.

weight of the evidence, appellate court need only review the record to determine whether the trial court's findings are supported by substantial evidence[.]) Cho's argument is meritless for multiple reasons.

First, an appellant who contends a finding lacks sufficient supporting evidence must provide a full and fair statement of the facts – including the evidence supporting the finding as well as any evidence to the contrary – in his or her opening brief. (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317.) Here, Cho includes only the evidence he believes supports his position. His argument as to the sufficiency of the evidence is therefore waived. (*Ibid.*)

Second, as to most of the factual assertions in his appellate briefs, Cho fails to provide a citation to the record. Those factual assertions are disregarded. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294; *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1260 fn. 1.) For this reason as well, his argument as to the sufficiency of the evidence fails.

Third, the record demonstrates that substantial evidence does support the court's factual findings, as well as the court's conclusion that the Board's findings were supported by the weight of the evidence. The VSP records and Cho's admissions that he saw C.K. on February 11, 2013 and other patients on February 18, 2013, establish that he engaged in the practice of optometry before he received his license in California. Certainly Cho knew he was not licensed on February 11, since he had not even taken the licensing test. It is a reasonable inference that he also knew he was not licensed on February 18, since the February 14 notice of his test passage explicitly told him he was not yet licensed and he did not receive his license until February 19. His argument that he was acting according to the Good Samaritan Law (Health & Saf. Code, § 1799.102) is patently false, since that statute applies only to services rendered without compensation for emergency care or at the scene of an emergency. His arguments regarding the VSP records and "clerical" errors as to February 18 are immaterial, since he admitted examining patients that day.

B. Punishment

Cho contends the Board was required to consider the gravity of his violation, his good or bad faith, any history of previous violations, whether the violation was willful, the extent of his cooperation in the investigation, any mitigation of damage caused by the violation, and other factors as justice requires. (Citing Cal. Code Regs., tit. 16, §1578 [pertaining to administrative fines and orders of abatement]; Bus. & Prof. Code, §§ 125.9, 3025.) He then urges that his license revocation (which was *stayed*) was unreasonable because “[n]o insurance fraud was shown to have been committed,” the VSP claims were made on behalf of a business run by Dr. Diep, he did not apply for a business license or obtain the 20/20 business until after he was licensed, and he had to wait over three years for resolution of the allegations against him.

Cho’s argument falls far short of demonstrating an abuse of discretion or other error. His assertion that he did not commit insurance fraud is debatable, and in any event does not change the fact that he practiced optometry while unlicensed. The fact billings were submitted to VSP on behalf of 20/20 under Dr. Diep’s name only makes things worse, since it shows Cho knew full well he was unlicensed and was willing to use another doctor’s name, without her permission, to obtain funds for a business he was in the process of buying. Cho rendered services not only while unlicensed, but without malpractice insurance. Moreover, evidence supported the conclusion that his violations were willful, he claimed what he did with respect to complainant C.K. was not a “big deal” and he would do the same thing again, and he demonstrated a lack of remorse and appreciation for the seriousness of his conduct. Even assuming the factors set forth in Code of Regulations section 1578 applied, Cho fails to establish error.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BURNS, J.

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